

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

October 13, 2004

IN RE:

**PETITION OF BELL SOUTH
TELECOMMUNICATIONS, INC. FOR
EXEMPTION OF CERTAIN SERVICES**

**DOCKET NO.
03-00391**

**ORDER GRANTING IN PART BELL SOUTH TELECOMMUNICATIONS, INC.'S
MOTION TO COMPEL RESPONSES TO ITS FIRST SET OF INTERROGATORIES
AND REQUESTS FOR PRODUCTION OF DOCUMENTS PROPOUNDED TO THE
CONSUMER ADVOCATE**

On June 16, 2003 BellSouth Telecommunications, Inc. ("BellSouth") and Citizens Communications, Inc. filed a *Petition for Exemption of Certain Services* ("*Petition*") in this docket requesting exemption from regulation of their intraLATA toll service and primary rate ISDN service ("PRI"). The Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate") was permitted to intervene in this docket by an order entered on January 8, 2004.

This matter is before the Hearing Officer for consideration of *BellSouth Telecommunications, Inc.'s Motion to Compel Responses to Its First Set of Interrogatories and Requests for Production of Documents Propounded to the Consumer Advocate and Protection Division of the Attorney General's office of the State of Tennessee* ("*Motion*") filed on August 30, 2004.

BACKGROUND

BellSouth's First Set of Interrogatories and Requests for Production of Documents to the Consumer Advocate was not filed with the Authority. The *Consumer Advocate and Protection Division's Responses to BellSouth Telecommunications Inc.'s First Set of Interrogatories and Requests for Production of Documents ("Answers")* were filed on August 16, 2004.

In its *Motion* BellSouth objected to the Consumer Advocate's answers to Interrogatory Nos. 1, 2, 3, 4, 6 and 9 and sought to compel answers to Interrogatory Nos. 6 and 9. The *Consumer Advocate and Protection Division's Response to BellSouth Telecommunications, Inc.'s Motion to Compel Responses to Its First Set of Interrogatories and Requests for Production of Documents ("Response")* was filed on September 8, 2004.

The relevant portions of BellSouth's interrogatories, the Consumer Advocate's answers, and the positions of the parties with respect to each are set forth below:

BellSouth Interrogatory No. 6:

Please identify and describe with specificity any way in which you believe that the market in Tennessee for PRI service is different than the market in other states for PRI service.

Consumer Advocate Answer to Interrogatory No. 6:

The Consumer Advocate objects to this interrogatory on the ground that it is not reasonably calculated to lead to the discovery of admissible evidence and is not relevant to the subject matter of this docket. In particular, potential differences between the PRI service market in Tennessee and the PRI service market in other states have no bearing on whether PRI service should be exempted from certain regulatory requirements pursuant to Tenn. Code Ann. § 65-5-208(b)

BellSouth Interrogatory No. 9:

Please identify all services that you believe provide end users with similar functionality to that provided by PRI.

Consumer Advocate Answer to Interrogatory No. 9:

The Consumer Advocate objects to this interrogatory on the ground that it is not reasonably calculated to lead to the discovery of admissible evidence and is not relevant to the subject matter of this docket. In particular, potential differences between PRI service and other services that may provide end users with similar functionality to that provided by PRI have no bearing on whether PRI service should be exempted from certain regulatory requirements pursuant to Tenn. Code Ann. § 65-5-208(b). The Consumer Advocate further objects to this interrogatory on the ground that it is vague, overly broad, imprecise, or uses terms that are subject to multiple interpretations. In particular, the term "similar functionality" is not properly defined or explained for purposes of this interrogatory.

POSITIONS OF THE PARTIES

In its *Motion* BellSouth objected to the Consumer Advocate's answer to Interrogatory No. 6 and stated:

BellSouth moves to compel on the basis that the interrogatory seeks to elicit information that would be relevant to the determination of the competitive nature of PRI in Tennessee. Comparison of this market to markets elsewhere in the United States may provide useful information on which the TRA may based [sic] its decision about whether the competitive nature of PRI service in Tennessee is sufficient to merit relief under this statute.¹

Regarding BellSouth Interrogatory No. 6 the Consumer Advocate stated in its *Response*:

The Consumer Advocate maintains its objection to this interrogatory. Without waiving this objection, the Consumer advocate states the following: To the extent BellSouth seeks to discover information or documents in the possession of the Consumer Advocate, the Consumer Advocate has attached hereto all the information and documents in its possession regarding the PRI service markets of other states. In accordance with the Rules of Civil Procedure, the Consumer Advocate will supplement its response to this interrogatory should it gather additional information regarding the PRI service markets of other states and/or should its analysis of pertinent information lead it to believe that the market in Tennessee for PRI service is different than the market in other states for PRI service.

¹ *Motion*, p 4 (August 30, 2004).

In its *Motion* BellSouth objected to the Consumer Advocate's answer to Interrogatory No.

9 and stated:

BellSouth objects that the Consumer Advocate's response is inadequate. The question is reasonably calculated to lead to the discovery of admissible evidence in that it seeks to obtain information that could be used to describe or define the market for services in Tennessee at issue in this docket. The TRA has often recognized the importance of "intermodal competition", that is, competition using different technologies to provide customers with similar or the same services. The interrogatory is designed to elicit any information the Consumer Advocate has about other services that may provide similar functions to customers and also is relevant to the issues that will be considered in this docket. The term "similar functionality" is used in the ordinary manner, is not a term of art, and is therefore not confusing.²

Regarding BellSouth Interrogatory No. 9 the Consumer Advocate stated in its *Response*:

The Consumer Advocate maintains its objection to this interrogatory. Without waiving this objection, the Consumer Advocate states the following: To the extent BellSouth seeks to discover information or documents in the possession of the Consumer Advocate, the Consumer Advocate states that it does not have any information or documents that are responsive to this interrogatory. In accordance with the Rules of Civil Procedure, the Consumer Advocate will supplement its response to this interrogatory should it gather information or documents regarding services that it believes provide end users with similar functionality to that provided by PRI.

DISCUSSION AND ANALYSIS

Authority Rule 1220-4-2-.10 directs that discovery shall be effectuated in accordance with the Tennessee Rules of Civil Procedure ("TRCP") when informal discovery is not practicable.³ TRCP 26.02 permits discovery through various means, including written interrogatories, and allows a party to "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party."⁴

² *Motion*, p. 5 (August 30, 2004).

³ Tenn. Comp. R. & Regs. 1220-4-2-.10

⁴ Tenn. R. Civ. P. 26.02(1).

Tennessee Courts have broadly construed the phrase “relevant to the subject matter involved in the pending action” to have a distinct meaning during the discovery stage of a case and to include as “relevant” any matter that bears on, or that reasonably could lead to a matter that bears on, issues and potential issues in the case.⁵

TRCP 26.02 permits a court to limit discovery if:

(i) the discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or, (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties’ resources, and the importance of the issues at stake in the litigation.⁶

TRCP 37.01 permits a party to file a motion to compel answers to interrogatories where responses are evasive or incomplete.⁷ “Decisions to grant a motion to compel rest in the trial court’s reasonable discretion.”⁸

BellSouth Interrogatory No. 6

The Hearing Officer finds that the Consumer Advocate has sufficiently responded to Interrogatory No. 6. Interrogatory No. 6 seeks the Consumer Advocate’s “belief” whether “the market in Tennessee for PRI service is different than the market in other states for PRI service.” The Consumer Advocate has stated its “belief” on this issue in its *Response* stating that it would supplement its response “should its analysis of pertinent information lead it to believe that the

⁵ “Relevancy is extremely important at the discovery stage. However, it is more loosely construed during discovery than it is at trial. The phrase ‘relevant to the subject matter involved in the pending action’ has been construed ‘broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.’” *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 220 n.25 (Tenn. Ct. App. 2002) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, 98 S.Ct. 2380, 2389, 57 L.Ed2d 253 (1978)).

⁶ Tenn. R. Civ. P. 26.02(1)

⁷ Tenn. R. Civ. P. 37.01(2)

⁸ *Kuehne & Nagel, Inc. v. Preston, Skahan & Smith International, Inc.*, 2002 WL 1389615, *5 n.4 (Tenn. Ct. App. June 27, 2002)

market in Tennessee for PRI service is different than the market in other states for PRI service.” Given the Consumer Advocate’s answer that it has not yet been “led to believe” that the Tennessee market for PRI is different than the PRI market in other states, the Consumer Advocate’s answer to Interrogatory No. 6 is sufficiently responsive.

BellSouth Interrogatory No. 9

The Hearing Officer finds that the Consumer Advocate has not sufficiently responded to Interrogatory No. 9. BellSouth’s interrogatory does not merely seek documents or information in some other tangible form. The interrogatory seeks the Consumer Advocate’s “belief” regarding the identity of all services that provide end users with functionality similar to that provided by PRI.

Any belief that the Consumer Advocate may have regarding services that provide end users with functionality similar to that provided by PRI is relevant to this case within the meaning of the above-described legal standard for relevancy during the discovery stage of this proceeding because such belief bears on, or reasonably could lead to matters that bear on, issues and potential issues in this case.⁹

The term “belief” is synonymous with the term “position.”¹⁰ A party is not entitled to shield any belief or position it may have regarding an issue central to the case. The effect of exempting PRI service from certain regulatory requirements is an issue central to this docket. The existence of services providing similar functionality to PRI is relevant because the issue of

⁹ This finding is consistent with previous Authority decisions regarding “contention discovery.” See *In Re Petition of Tennessee American Water company to Change and Increase Certain Rates and Charges so as to Permit It to Earn a Fair and Adequate Rate of Return on its Property Used and Useful In Furnishing Water Service to Its Customers*, Docket No. 03-00118, *Order Granting Motions to compel in Part and Denying in Part*, p. 5 (April 25, 2003). See also *In Re Petition of MCI WorldCom, Inc. to Enforce Interconnection Agreement with BellSouth Telecommunications, Inc.*, Docket No. 99-00662, *Order Granting in Part and Denying in Part BellSouth Telecommunications, Inc.’s Motion to Compel*, p. 5 (September 1, 2000).

¹⁰ See “belief”, Roget’s New Millennium™ Thesaurus, First Edition (v 1 0 5), Lexico Publishing Group, LLC.

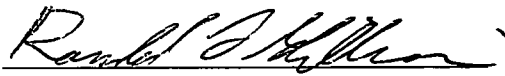
whether such services exist bears on, or reasonably could lead to a matter that bears on, the central issue of the effect of exempting PRI service from certain regulatory requirements.¹¹

For the foregoing reasons the Hearing Officer finds that, to the extent that the Consumer Advocate has a belief on this issue, the Consumer Advocate should fully respond to Interrogatory No. 9 and identify all services it believes provide end users with similar functionality to that provided by PRI.

IT IS THEREFORE ORDERED THAT:

1. *BellSouth Telecommunications, Inc 's Motion to Compel Responses to Its First Set of Interrogatories and Requests for Production of Documents Propounded to the Consumer Advocate* is granted in part as set forth herein.

2. The Consumer Advocate shall supplement its response to Interrogatory No. 9 on or before 2:00 p.m., Wednesday, October 20, 2004.


Randal L. Gilliam, Hearing Officer

¹¹ This finding is consistent with previous Authority decisions regarding "contention discovery." See *In Re Petition of Tennessee American Water company to Change and Increase Certain Rates and Charges so as to Permit It to Earn a Fair and Adequate Rate of Return on its Property Used and Useful In Furnishing Water Service to Its Customers*, Docket No. 03-00118, *Order Granting Motions to compel in Part and Denying in Part*, p. 5 (April 25, 2003). See also *In Re Petition of MCI WorldCom, Inc. to Enforce Interconnection Agreement with BellSouth Telecommunications, Inc.*, Docket No. 99-00662, *Order Granting in Part and Denying in Part BellSouth Telecommunications, Inc 's Motion to Compel*, p. 5 (September 1, 2000)